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IN THE

Supreme Court of the United States

October Term, 1955

No. 735

W. RALPH DAVIS, FRANK A. LEAMY, and MARGARET M. BOOTHE, Individually and as officers of Belle Haven Citizens' Association, a corporation,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners, who were intervenors below, pray that a writ of certiorari issue to review the judgment entered on December 12, 1955, by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is printed in the appendix hereto, infra, p. 13. It is reported at 228 F. 2d 280. For the convenience of the court the

order, findings of fact and conclusions of law of the District Court, which constituted the entire printed record below, are also printed in the appendix, infra, p. 20, et seq.

This is the second time this litigation has been before this court. The prior opinion of this court is reported at 345 U.S. 344. The prior opinion of the Court of Appeals is reported at 196 F. 2d 657. The earlier opinions of the District Court are reported at 89 F. Supp. 567, 101 F. Supp. 172, and 121 F. Supp. 268.

JURISDICTION

The judgment of the Court of Appeals, which is printed in the appendix hereto (infra, p. 19), was entered on December 12, 1955. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the finding of fact by the District Court that the President did not approve the taking of the Belle Haven sewer system, as required by the Lanham Act, was clearly erroneous.

2. Whether the taking of the Belle Haven sewer system was for a public use, under the Fifth Amendment.

3. Whether the finding of fact by the District Court that funds were allotted for substantial additions and improvements to the Belle Haven sewer system, within the intent of the Lanham Act as amended, was clearly erroneous.[1]

---

[1] Petitioners do not contend that this question would of itself merit consideration by this court. They do wish to rely on it if certiorari is granted.

STATUTES INVOLVED

The Act of October 14, 1940, Title II, sec. 202, as added June 28, 1941, 55 Stat. 362, 42 U.S.C. 1532, known as the "Lanham Act", provided in relevant part as follows:

> "Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the Federal Works Administrator[2] is authorized, with the approval of the President, in order to relieve such shortage—
>
> "(a) To acquire * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation (including proceedings under sections 257, 258, 361-368 and 258a-258e of Title 40, for such public works)."

The Act of July 15, 1943, 57 Stat. 565, as amended July 3, 1945, 59 Stat. 383, 42 U.S.C. 1534, note, amended the Lanham Act as follows:

> "* * * Provided further, That (a) none of the funds authorized herein shall be used to acquire public works already operated by public or pri-

[2] During all times relevant here the cognizant official was the Federal Works Administrator. The statute now reads "Housing and Home Finance Administrator."

of Fairfax County where defense housing was to be built. That finding had been made to support the construction, under the Lanham Act, of the trunk system (which had been completed in 1943). Furthermore, none of the statutory prerequisites specially attached to the taking of an existing utility, by the 1943 amendment to the Lanham Act (supra, p. 3), was alleged to have been satisfied. The Federal Works Agency made no attempt to satisfy these prerequisites, as such. It did not even know of them, as is shown by the fact that a brief filed on its behalf in 1951 denied that they were in the statute at the time of this taking.[4]

Petitioners here are the representatives of the Belle Haven householders. When they began to receive bills from Fairfax County for the use of their sewer system, and discovered that it was involved in a condemnation proceeding, they sought and were granted leave to intervene (R. 138). After several hearings the District Court granted petitioners' motion to dismiss the proceeding on the ground that the "consent of the owners" required by the 1943 amendment to the Lanham Act had not been given for the condemnation, (R. 260). The Court of Appeals affirmed, 196 F. 2d 657. This court granted certiorari, reversed the judgment, and remanded the case for trial on the facts, 345 U.S. 344.

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[4] The Government stated, in its *Brief in Opposition to Intervenors' Motion to Dismiss*, dated January 8, 1951, that "the Appropriations Act of July 15, 1943 (42 U.S.C.A. Section 1534 Note) • • • has since been amended by the Act of July 3, 1945, 42 U.S.C.A. Section 1534, *so as to exclude the provision quoted by intervenors.*" (Emphasis supplied) (p. 8). The "provision quoted by intervenors" was the provision set out above at page 3, and which this court held to be controlling in the premises, 345 U.S. at 348.

On remand the District Court set down for hearing the following issues of fact:

(1) Whether or not the taking of the Belle Haven sewer system was for a public purpose;

(2) Whether or not the President approved this specific project, as required by the Lanham Act as amended;

(3) Whether or not funds were allotted for substantial additions or improvements to the Belle Haven sewer system, as required by the Lanham Act as amended; and

(4) Whether or not the Belle Haven Realty Corporation gave its consent to the acquisition by the plaintiff of the Belle Haven sewer system.

Following a trial to the court, without a jury, the court again dismissed the proceeding, on the basis of accompanying findings of fact and conclusions of law (Appendix, infra, p. 20). This judgment was reversed by the court below, pursuant to the opinion printed in the appendix, infra, p. 13.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is directly in conflict with the decision of the United States Court of Appeals for the First Circuit in *Puerto Rico Ry. Light & Power Co.* v. *United States,* 131 F. 2d 491 (1942), and with the decision of the United States Court of Appeals for the Seventh Circuit in *Wildermuth* v. *United States,* 195 F. 2d 18 (1952). Both of these decisions held, as did the District Court here, that the requirements of the Lanham Act for findings by the President in support of a taking should be enforced as written. It would be hard to find a more direct conflict than that between the decision below and the

First Circuit decision, since the President's letter relied on here (see Appendix, infra, p. 25), was substantially identical to that involved in the First Circuit case, see 131 F. 2d 496, n. 5.

The conflict with the *Wildermuth* decision in the Seventh Circuit is also direct. There the President approved construction under the Lanham Act of a school estimated to cost $73,660. Plaintiffs were the architects for the project, and prepared plans for a building to cost that amount. The Federal Works Agency subsequently determined that an adequate building could not be built for $73,660, and requested plaintiffs to prepare plans for a building to cost $123,046. Later, plans were requested for a still larger building, to cost $169,048. The court held that the plaintiffs could not collect their fees for the enlarged project because it was never approved by the President, 195 F. 2d 23-24. In the present case, the President's letter of March, 1942, authorized a project which was estimated to cost $936,000 (Appendix, infra, p. 25). This project was completed in 1943 (Gov't Exh. No. 22, R. 443), after $1,659,073.31 had been spent on it, (Appendix, infra, p. 29). The completed project was thus so much more costly than that approved by the President as to come squarely within the reasoning of the Seventh Circuit in the *Wildermuth* case. Moreover, if the project had included the Belle Haven system, as the court below held, then the discrepancy would be increased by the amount of the condemnation awards to the Belle Haven property owners.[5]

---

[5] This was overlooked by the court below, which refers in this connection only to the $3 preliminary deposit by the Government under the Declaration of Taking Act (Appendix, *infra*, p. 17).

2. The decision below conflicts with the prior decision of this court in this proceeding, as petitioners understand it. Chief Justice Vinson, in enumerating[6] the questions which should be considered by the District Court upon remand, included "the factual questions of whether the President approved *this specific project* as required by Title II, *Puerto Ry. Light & Power Co.* v. *United States*, 131 F. 2d 491, 495, 496 * * *." (Emphasis supplied.) Since the only subject matter before the court was the taking of the Belle Haven system, it is clear that this was the "specific project" referred to by the Chief Justice. The District Court so construed the mandate. The Court of Appeals has now nevertheless held that specific approval of the taking of the Belle Haven system was unnecessary.

3. The decision of the court below is in conflict with the Fifth Amendment, and with applicable decisions of this court, in holding that the Belle Haven sewer system was taken for a "public use." The system was admittedly taken in order to be transferred immediately to Fairfax County. Fairfax County wanted the system in order to charge the residents of Belle Haven for the use of their own sewer system and for amortization of the purchase price to the County of its trunk system (Appendix, infra, p.23). The taking was pursuant to the following recommendation by a division engineer of the Federal Works Agency on January 29, 1948:

> "Division Engineer Sullivan has now recommended the acquisition of the system on the basis

[6] It appears to be immaterial for this purpose that the enumeration was in the course of a dissenting opinion. The majority opinion did not enumerate the questions to be considered on remand, see 345 U.S. 350.

> that it will be in the Government's interest as we will be in a better position to dispose of the project to the Board of Supervisors of Fairfax County, since the lines serving the 200 odd homes in the Belle Haven Subdivision will be owned by the Government and *the Board of Supervisors will be in a better position to enforce collection of the revenues from the residents of such homes.*" (Gov't Exh. No. 25, par. 3, R. 447) (Emphasis supplied).

The purpose of this taking was thus to enable a local county to charge a group of its citizens for the use of a utility which they had paid for, and to force them to contribute to the capital cost of another utility from which they receive no benefit. Such a cynical purpose simply cannot be a "public use" within the intent of a great constitutional principle. The words of Chief Justice Vinson in this respect, on the court's prior review of this case, lose nothing by being in a dissenting opinion:

> "* * * Most of what there presently is in the records supports the inference that the federal power of eminent domain was exercised here to help a local county solve a problem of sewerage assessments. If this be true, I think the whole affair is completely unworthy of the high trust which should attend use of the sovereign power of eminent domain." *United States* v. *Certain Parcels of Land,* 345 U.S. at 358, n. 10.

a. The decision below is in further conflict with the Fifth Amendment, and with applicable opinions of this Court, in sustaining an exercise of the federal power of eminent domain on behalf of another sovereignty. In the foundation case of *Kohl* v. *United States,* 91 U.S. 367, 23 U.S. Supreme Court Rep'ts 449 (1876), this Court said:

"* * * The proper view of the right of eminent domain seems to be, that it is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another. Beyond that, there exists no necessity, which alone is the foundation of the right." 23 Supreme Court Reports at 452.

This principle was reaffirmed in *United States* v. *Carmack*, 329 U.S. 230 (1946), where the court said:

"*While the federal power of eminent domain is limited to taking property for federal public uses*, the question of the existence of a federal public use presents no difficulty here because the constitutional power of Congress to establish post offices is express." (Emphasis supplied) 329 U.S. at 239.

There was no federal need for taking a local sewer system in 1948, and none has been suggested. The power of condemnation in the Lanham Act was a part of the World War II defense program, and was grounded, presumably, upon the war power. There was no defense program in 1948, nearly three years after the end of World War II, and two years before the onset of the Korean War.

4. The questions thus presented are important. Chief Justice Vinson expressed their real importance in his dissenting opinion, concurred in by Mr. Justice Reed, when this matter was here before:

"The condemnation of one small sewerage system may seem an insignificant thing in view of the vast scope of federal eminent domain powers, and much of the impact of the present decision may be balmed over with the assurance that intervenors can claim just compensation for their losses. But there is something at stake here which transcends

> the immediate interests of the parties. That is the duty of the courts and administrators to keep faith with Congress in the interpretation and execution of a statute in which Congress carefully limited the powers of eminent domain because of sensitive policy considerations which were for Congress alone to evaluate. * * *" 345 U.S. 359-360.

Petitioners submit that it is also important to uphold the constitutional limitations upon exercise of the federal power of eminent domain. Here both that power and, presumably, the war power have been exercised "at the behest" of certain local officials, in the absence of any federal need. The residents of Belle Haven have had the temerity and tenacity to resist this unjust proceeding for eight years. The District Judge who has heard the matter in all its stages, and has written four opinions on it, has twice held the taking unauthorized. We earnestly submit that the matter is of sufficient importance for this court again to review.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX

Opinion

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7072

United States of America,
Appellant,

versus

Certain Parcels of Land in the County of Fairfax, Commonwealth of Virginia, and Belle Haven Realty Corporation, et al.; and W. Ralph Davis, Frank A. Leamy, et al.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT ALEXANDRIA.

(Argued October 17, 1955. Decided December 12, 1955.)

Before PARKER, Chief Judge, and SOPER and DOBIE, Circuit Judges.

S. Billingsley Hill, Attorney, Department of Justice, (Perry W. Morton, Assistant Attorney General, Lester S. Parsons, Jr., United States Attorney, and Roger P. Marquis, Attorney, Department of Justice, on brief) for Appellant, and Frederick A. Ballard (Joseph W. Wyatt on brief) for Appellees.

PARKER, Chief Judge:

This is the second appeal to come before this court in connection with the condemnation of the Belle Haven sewer system. On the first appeal we held that the condemnation was not authorized by the Lanham Act, (196 F. 2d 657) but this was reversed by the Supreme Court and the case remanded to the District Court for further proceedings. *United States* v. *Certain Parcels of Land in the County of Fairfax, Virginia,* 345 U. S. 344. Upon the remand the District Judge considered four questions: (1) whether the taking was for a public purpose; (2) whether the President had given his approval as required by the Act; (3) whether or not funds had been allotted as required by the Act as amended; and (4) whether the Belle Haven Realty Corporation had given its consent to the acquisition of the system by the United States. The District Judge answered all of these questions except the second in favor of the United States, but dismissed the proceeding on the ground that the President had not given the approval required by the Act, and the United States has appealed. The intervenors, who are lot owners in the Town of Belle Haven, contend that the dismissal should be sustained on the ground stated by the District Judge but urge as additional grounds for affirmance the points which he decided adversely to them as to public use and allotment of funds.

The history of this litigation and the facts upon which it is based are fully set forth in prior reported opinions and need not be repeated here. See 89 F. Supp. 567, 89 F. Supp. 571, 101 F. Supp. 172, 196 F. 2d 657, 345 U. S. 344, and 121 F. Supp. 268. Briefly stated, the material facts are that in March 1942, General Fleming, the acting administrator of the Federal Works Agency, sought presidential approval for the construction of an extensive sewer system in Fairfax County, Virginia, as necessary to the health, safety and welfare of persons engaged in defense activities. This request was for presidential approval pursuant to the Act of October 14, 1940, Title II, Lanham Act, sec. 202, as added

June 28, 1941, 55 Stat. 362, 42 USCA sec. 1532, which is as follows:

> "Whenever the President finds that in any area or locality an acute shortage of public works or equipment for public works necessary to the health, safety, or welfare of persons engaged in national-defense activities exists or impends which would impede national-defense activities, and that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists, the (Federal Works Administrator) is authorized, with the approval of the President in order to relieve such shortage—(a) To acquire, prior to the approval of title by the Attorney General if necessary * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease * * * or condemnation (including proceedings under sections 257, 258, 361-368 and 258a-258e of Title 40, for such public works.)"

On March 11, 1942, the President approved the project, making necessary findings, in a letter to General Fleming, which is as follows:

> "My dear General Fleming:
> "Pursuant to Title II of the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, I hereby find that an acute shortage of public works or equipment for public works, as indicated opposite the name of the place listed below, necessary to the health, safety, or welfare of persons engaged in national defense activities, exists or impends, which would impede national defense activities, in the area or locality in and about the following place:

Place	*Public Works or Equipment Required*	*Total Estimated Cost*
Various, in Fairfax County, Virginia	Sewer Facilities	$936,000

"I further find that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists.

"I hereby approve your taking action by any of the methods prescribed by said Act to relieve such shortage"

Accompanying the letter of General Fleming to the President was a certificate from the United States Public Health Service and a letter from the Surgeon General describing the project as the construction of trunk sewers, pumping stations and sewage treatment plant to serve the northeast section of Fairfax County at an estimated cost of $936,000. These were accompanied by a plat showing two trunk sewers, pumping station and treatment plant. Before work on the project was undertaken, it was decided that, instead of a sewage treatment plant with pumping station, a system with outfall into the Potomac River would be more advantageous. In constructing the latter, it was found that the trunk sewers of the Belle Haven System could be used as a part of the system being constructed, and that their use would involve considerable saving as well as eliminate useless duplication of sewer mains. In 1944, therefore, proceedings were instituted for the condemnation of the sewer mains of the Belle Haven Realty Corporation which were needed for this purpose and $2 was deposited as just compensation. The corporation having indicated that any taking should include its entire system

and having agreed to accept nominal compensation therefor, the scope of the taking was enlarged to include the entire system and an additional $1 was deposited as just compensation. It appears that $732,073.31 has been spent on the project in addition to the original estimate of $936,000, but this has been largely because of increase in cost of labor and materials and has been covered by appropriations duly made by Congress. It is manifest that the increased cost has not been occasioned by the taking of the Belle Haven system for the nominal compensation of $3. The government has since conveyed the entire sewer system to Fairfax County, and the county has sought to impose service charges on residents of Belle Haven for sewer service.

We think that the District Judge was in error in holding that the President did not approve the project of which this was a part, as required by the Lanham Act. The President unquestionably gave his approval to the construction of a sewer system to serve the defense workers housed in Fairfax County and to the acquisition of needed facilities for that purpose; and it is not reasonable to assume that it was the intention of the Congress that he should pass upon the details of such projects, or that the details of construction or acquisition should be frozen by his certificate of approval or that it would be necessary to run back to him for permission when any changes were made therein. Of couse, approval of the project would not authorize the construction of something entirely different. *Puerto Rico Ry. Light & Power Co.* v. *United States* 1 Cir. 131 F. 2d 491; *Wildermuth* v. *United States* 7 Cir. 195 F. 2d 18. That is not, however, what we have here. The sewer system in main outline was built as planned to furnish sewerage for the housing of defense workers in Fairfax County. The acquisition of the Belle Haven system was but an incident in the carrying out of that plan. The acquisition of the mains of the Belle Haven system of a nominal consideration effected a considerable saving in the cost of the project and there

was no reason why the laterals should not be taken over also, if in the opinion of those charged with responsibility in the premises this was necessary or desirable in connection with the acquisition of the mains, or was desirable otherwise from the standpoint of health or efficiency in furnishing sewerage for the housing of defense workers. *Berman* v. *Parker* 348 U. S. 26, 36; *United States ex rel. TVA* v. *Welch* 327 U. S. 546, 552-553. It is argued that the President did not give approval to the acquirement of the Belle Haven system; but there is nothing in the Act which can be construed as requiring approval by the President of incidental features of a project which he has approved as a whole in general outline.

Other grounds relied upon for sustaining the order of dismissal were rejected by the District Judge for reasons adequately stated in his opinion with which we are in accord. The order of dismissal will accordingly be reversed and the case will be remanded to the District Court for further proceedings not inconsistent herewith.

Reversed and Remanded.

Judgment

Filed and Entered December 12, 1955.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7072.

United States of America,
Appellant,

versus

Certain Parcels of Land in the County of Fairfax, Commonwealth of Virginia, and Belle Haven Realty Corporation, et al.; and W. Ralph Davis, Frank A. Leamy, Margaret M. Boothe, Individually and as Officers of Belle Haven Citizens' Association, a corporation, Intervenors,

Appellees

APPEAL FROM the United States District Court for the Eastern District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of dismissal of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and that this cause be and the same is hereby, remanded to the United States Dis-

trict Court for the Eastern District of Virginia, at Alexandria, for further proceedings not inconsistent with the opinion of the Court filed herein.

JOHN J. PARKER
Chief Judge, Fourth Circuit.
MORRIS A. SOPER
United States Circuit Judge.
ARMISTEAD M. DOBIE
United States Circuit Judge.

January 9, 1956, motion of appellees for stay of mandate filed.

AT A REGULAR TERM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA HELD AT ALEXANDRIA ON THE 16TH DAY OF MARCH, 1955.

Miscellaneous No. 555

UNITED STATES OF AMERICA, PETITIONER

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION, ET AL., DEFENDANTS

W. RALPH DAVIS, FRANK A. LEAMY, MARGARET M. BOOTHE, INDIVIDUALLY AND AS OFFICERS OF BELLE HAVEN CITIZENS' ASSOCIATION, A CORPORATION, INTERVENORS

Order

For reasons fully set out in the Court's findings of fact and conclusions of law this day filed, the Court being of the opinion that the approval of the President of the condemnation of land and easements thereto appertaining sought by petitioner herein, has not been obtained, and that therefore the condemnation herein sought by petitioner is not authorized by the statute relied upon by petitioner for its authority to condemn said real estate and easements thereunto pertaining, it is so adjudged. It is therefore

ORDERED that the order entered herein on April 8, 1948, vesting title in petitioner and awarding to petitioner possession of the real estate and easements thereunto pertaining, described in petitioner's petition and amended petition and in said order, the order entered herein on February 24, 1949, vesting title in petitioner to said property, together with any other orders which may have been entered herein vesting title in petitioner and awarding to petitioner possession of said real estate, be, and the same are, hereby set aside and held for naught; and it is furthere ORDERED that this action be, and the same is, hereby dismissed and stricken from the docket at the costs of the petitioner: to all of which action by the court petitioner, by counsel, duly objected and excepted for reasons fully stated to the court.

It is further ORDERED that the Clerk certify and mail copies hereof, together with copies of the court's findings of fact and conclusions of law, to L. S. Parsons, Esq., United States Attorney, Richmond, Virginia, Robert R. MacLeod, Esq., Lands Division, Department of Justice, Washington, D. C., attorneys for the petitioner; and Frederick A. Ballard, Esq., American Security Building, Washington, D. C., Joseph W. Wyatt, Esq., Wyatt Building, Washington, D. C., and Newell Blair, Esq., Tower Building, Washington, D. C., attorneys for the respondents.

Enter:

(S.) A. W. BARKSDALE,
United States District Judge Designate.

A copy.
Teste:

(S.) FRANCIS E. MUMFORD,
Deputy Clerk.

AT A REGULAR TERM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA HELD AT ALEXANDRIA, ON THE 16TH DAY OF MARCH, 1955

Miscellaneous No. 555

UNITED STATES OF AMERICA, PETITIONER

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, COMMONWEALTH OF VIRGINIA, AND BELLE HAVEN REALTY CORPORATION ET AL., DEFENDANTS

W. RALPH DAVIS, FRANK A. LEAMY, MARGARET M. BOOTHE, INDIVIDUALLY AND AS OFFICERS OF BELLE HAVEN CITIZENS' ASSOCIATION, A CORPORATION, INTERVENORS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

For reasons set out in an opinion filed herein on May 18, 1954 (121 F. Supp. 268), a contemporaneous order was entered setting down for hearing and determination the following issues of fact, upon such evidence as the parties hereto saw fit to introduce:

(1) Whether or not the taking of the Belle Haven sewer system was for a public purpose;

(2) Whether or not the President approved this specific project, as required by the Lanham Act as amended;

(3) Whether or not funds were allotted for substantial additions or improvements to the Belle Haven sewer system, as required by the Lanham Act as amended; and

(4) Whether or not the Belle Haven Realty Corporation gave its consent to the acquisition by the plaintiff of the Belle Haven sewer system.

On January 17-18, 1955, these issues were tried upon the facts without a jury, and the court does hereby find the facts specially upon each issue, states separately its conclusions of law thereon, and directs the entry of the appropriate judgment:

Findings of Fact

(1) *Whether or not the taking of the Belle Haven sewer system was for a public purpose*

Counsel for the Government admits that this is a justiciable question, but contends that the taking was clearly for a public purpose, and I agree. It does appear from the evidence that, at the time of the taking, the Belle Haven sewer system was an integrated and functioning utility, and that the taking by the Government was for the purpose of including it in a much larger sewer system, primarily at the behest of the County of Fairfax. It further appears that, at the time of the taking, it was contemplated that the entire sewer system, including Belle Haven, would be sold by the Government to Fairfax County, or a sanitary district thereof, and maintained by it. It was the plan of Fairfax County to impose a service charge upon the users of the sewer system sufficient to cover maintenance expenses and amortization of the purchase price paid to the Government. It was the desire of Fairfax County that the Government take and turn over to it the Belle Haven system so that the county would be free to impose service charges on the Belle Haven users of the sewer, which would be uniform with the service charges to others.

Notwithstanding these facts, I find that, under the law, the taking was for a public purpose. In the "Declaration of Policy" (42 USCA 1531) of the Lanham Act ". . . sewerage, garbage and refuse disposal facilities, public sanitary facilities, . . .," are included within the term "public work". Counsel for intervenors, in their contention that the facts here do not justify a finding that this

taking was for a public use, rely upon *United States* v. *1278.83 acres of land,* 12 FRD 320, and *United States* v. *209.25 acres of land,* 108 F. Supp. 454. It does not appear to me that the first case supports intervenors' contention. The second case does certainly tend to support their contention, but *sub nom United States* v. *Willis,* 211 F. (2) 1, this case was reversed and certiorari was denied, 347 U.S. 1015. On the other hand, the case of *United States* v. *Carmack,* 329 U. S. 230, and more particularly the very recent case of *Berman* v. *Parker,* 348 U. S. 26, require the finding that the taking of the Belle Haven sewer system was for a public use.

(2) *Whether or not the President approved this specific project as required by the Lanham Act as amended.*

To prove the required presidential approval, the Government introduced a folder referred to as the "President's Book". This "Book" contains, primarily, a letter from the Acting Administrator of the Federal Works Agency dated March 3, 1942, and the President's reply dated March 11, 1942, which are as follows:

"My dear Mr. President:

"I have assured myself that, within the meaning of Title II of the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, an acute shortage of public works or equipment for public works, as indicated opposite the name of the place listed below, necessary to the health, safety, or welfare of persons engaged in national defense activities, exists or impends, which would impede national defense activities, in the area or locality in and about the following place:

Place	*Public Works or Equipment Required*	*Total Estimated Cost*
Various, In Fairfax County, Virginia	Sewer Facilities	$936,000

"I have further assured myself that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists.

"A supporting certificate and a summary of the pertinent facts are attached for your further information. The contemplated plan of financing is subject to such revisions as may be advantageous to the Government or necessary to meet the urgent national defense need.

"I recommend, therefore, that the proposed finding submitted herewith be made by you and that you approve my taking action by any of the methods prescribed by said Act to relieve such shortage."

The President's reply is as follows:

"My dear General Fleming:

"Pursuant to Title II of the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, I hereby find that an acute shortage of public works or equipment for public works, as indicated opposite the name of the place listed below, necessary to the health, safety, or welfare of persons engaged in national defense activities, exists or impends, which would impede national defense activities, in the area or locality in and about the following place:

Place	*Public Works or Equipment Required*	*Total Estimated Cost*
Various, In Fairfax County, Virginia	Sewer Facilities	$936,000

"I further find that such public works or equipment cannot otherwise be provided when needed, or could not be provided without the imposition of an increased excessive tax burden or an unusual or excessive increase in the debt limit of the taxing or borrowing authority in which such shortage exists.

"I hereby approve your taking action by any of the methods prescribed by said Act to relieve such shortage."

The Acting Administrator's letter recites that "a supporting certificate and a summary of the pertinent facts are attached for your further information." As the project approved is described so vaguely, it is necessary to examine the "supporting certificate" and summary of "the pertinent facts" and all other pertinent evidence, to determine just what the President did approve. The supporting documents referred to by the Acting Administrator and included in the President's Book are a certificate of the United States Public Health Service, a letter from the Surgeon General, and a plat, in the first of which there appears the following:

"DESCRIPTION OF PROJECT: The construction of the trunk sewers, pumping stations, and sewage treatment plant, to serve the northeast section of Fairfax County."

"ESTIMATED COST: 936,000".

The Surgeon General's letter dated February 13, 1942, contains the following:

"*Project Description.* The proposed project provides for the construction of trunk sewers, pumping stations, and a sewage treatment plant to serve the northeast section of Fairfax County. The total cost of the proposed work is estimated at $835,684, by the Applicant."

The only other document in the President's Book is a plat, the legend of which indicates that "This Project" is shown in red. The only things shown in red as comprising "This Project" are trunk sewers, pumping stations, and a sewage treatment plant.

The total estimated cost shown in the President's letter of approval is $936,000.00. No sewage disposal plant has ever been built as a part of this project. In a letter of October 2, 1942, from the Chief, Projects Division, to the Administrator, the approved project with an estimated cost of $936,000 was described as follows:

> "12 inch to 36 inch diameter trunk sewers and outfalls, totalling approximately 16 miles in length; 2 lift stations and approximately 2 miles of 12 inch and 14 inch diameter sewer mains, and a primary sewage treatment plant having a capacity of 40,000 persons, including necessary equipment and land rights."

This letter recommends that the description be now amended to be "approximately 19 miles of 15 inch to 36 inch trunk sewers, including 700 linear feet to temporary subaqueous outfall, including appurtenant work and land rights," and that the amount allotted be increased to $1,461,397.87. It would seem, therefore, that not only the sewage treatment plant, but the pumping stations, were eliminated from the project, and a gravity system with subaqueous outfalls was substituted.

Further considering the evidence bearing on what project the President approved, it appears that, in November, 1941, the County of Fairfax made an application for money for numerous utilities aggregating in excess of two and a quarter million dollars. It appears that in January, 1942 (Government Exhibit 11), Fairfax County revised its application and applied for $972,080. in order to construct a trunk sewer. It is to be noted that this application is solely for a trunk sewer, and in his letter of January 23,

1942 (Government Exhibit 11), to the Federal Works Agency, the County's Consulting Engineer makes it clear that the project for which Government money is requested is solely a trunk sewer, and says:

> "The applicant (Fairfax County) will take steps to establish a sanitary district in this area for the purpose of providing the necessary utilities in sewer mains, laterals and water service. This, however, must be referred to public referendum and should not be done until the defense development is of sufficient size to be of taxable value and the defense workers have a voice at the polls. The proposed defense housing project will be all connected with the trunk sewers as their setups include the construction of sewer laterals and mains."

On this application, its Engineer reported to Federal Works Agency on February 5, 1942 (Government's Exhibit 15), its Field Finance Examiner reported to the Federal Works Agency on this project on February 10, 1942 (Government Exhibit No. 16). Both these reports consider only the construction of a trunk sewer, pumping stations and treatment plant. It is quite obvious that no consideration was given to expenditure of Government funds for the acquisition of a sewer system such as Belle Haven, or anything else in the way of sewer facilities, except a trunk sewer, pumping stations and treatment plant. In fact, the Finance Examiner says in his report:

> "The Applicant now plans to provide the Project prior to the organization of a sanitary district and to later organize such a district in order to construct and finance sewer mains and laterals to connect to the Project."

Both the Finance Officer and the Engineer reported that a sewage treatment plant was not then necessary and recommended that it be eliminated from the project. How-

ever, although never constructed, the treatment plant was included in the project as approved by the President.

It seems clear from the evidence before me that the project approved by the President consisted solely of trunk sewers, pumping stations and treatment plant. I am satisfied that the project approved by the President was never meant to, nor did it, include, or even consider the inclusion of, the integrated and functioning Belle Haven Sewer System, or any other laterals and mains intended to connect with the trunk sewer. This conclusion is also buttressed by the testimony of the Government's witness, Mr. McNerny, who testified that the acquisition of the Belle Haven Sewer System and the inclusion of it in this project was never even discussed until about July, 1942, some four months after the President's approval of the project. Of course, I am not of the opinion that it was necessary for every detail or ramification of a project to be included in the President's letter of approval. However, I am definitely of the opinion that, in order for presidential approval to apply to a taking, the property to be taken must have, at least generally, been within the ambit of the description of the project. The approved project here only contemplated, and was limited to trunk sewers, pumping stations, and a treatment plant, the total estimated cost of the project being $936,000.00. At the time the President approved this project, there was no thought on the part of anyone that mains, laterals and other facilities connected with, or to be connected with, the trunk sewer, were included in the project. Although the pumping stations and the treatment plant included in the approved project have been eliminated, it now appears that, in addition to the total estimated cost of the project approved by the President, there has already been allotted, and I presume spent, the additional sum of $723,073.31. How can it be said that the President's approval of a project with a total estimated cost of $936,000.00 constitutes an approval of a project which has already cost $1,659,073.31, al-

though the treatment plant and pumping stations have been eliminated? But even more important to me as showing lack of presidential approval is the fact that the project as developed is entirely different from the project approved by the President. The approved project was "trunk sewers, pumping stations, and a sewage treatment plant," the project as developed consists of a trunk sewer and an integrated and comprehensive system of sewer mains, laterals and connections.

I find only two cases shedding light on what is meant by the phrase, ". . . with the approval of the President . . .". In the first one, *Puerto Rico Railway &c.* v. *United States,* 131 F. (2) 491, it is said (p. 495):

> "From the text of the act and from the legislative history, we are satisfied that the President is required to approve at least in main outline the particular plan, program or project formulated by the Administrator for the relief of the defined shortage of public works or equipment therefor, before the Administrator is authorized to proceed. It is not enough that the President, after finding the existence of an acute shortage of public works in a given area or locality, should give the Administrator authority, carte blanche, to relieve such shortage by any of the various methods described in Section 202 which the Administrator might thereafter deem expedient."

In the later case, *Wildermuth &c.* v. *United States,* 195 F. (2) 18, under the Lanham Act, the President approved construction of a ten-room schoolhouse for an estimated cost of $84,000.00 upon the basis of a preliminary estimate of $73,660.00. When it was found that adequate facilities could not be constructed within the sum approved, architects, properly employed by an agent of the Administrator of the Federal Works Administration, prepared additional drawings for a ten-room building to cost an estimated $123,046.00. These drawings were submitted, but a

still larger building of thirteen rooms being proposed, to cost an estimated $169,048.00, the architects made preliminary drawings for this building, which were accepted. However, prior to any construction work, the Administrator abandoned the project. The architects sued under the Tucker Act for their fees. In holding that the architects could not recover, the court said:

> "The Commissioner's ultimate decision, viz., that, irrespective of the rider, plaintiffs were not entitled to additional compensation as a matter of law, was sound. The Lanham Act, as amended, 55 Stat. 362, 42 U.S.C.A., Sec. 1532, provides that the Administrator can undertake such a project as is here involved 'with the approval of the President'. In Puerto Rico Ry. Light & Power Co. v. United States, 1 Cir., 131 F. 2d 491, 496, the only reported case interpreting this language, it was held to require 'approval [of] the particular project determined upon by the Administrator'. It cannot be said that approval of a $73,666 project can be extended to cover first a $123,046 and then a $169,028 undertaking. In the absence of any showing of presidential approval of these latter projects, the Administrator lacked the authority to contract for their performance. It is axiomatic that contracts with the government must be in strict conformity with the authority conferred before they are enforceable. Federal Crop Ins. Corp. v. Merrill, 1947, 332 U.S. 380, 384, 68 S.Ct. 1, 92 L.Ed. 10; Hawkins v. United States, 1877, 6 Otto 689, 96 U.S. 689, 24 L.Ed. 607; In re Floyd Acceptances, 1868, 7 Wall 666, 74 U.S. 666, 19 L.Ed. 169; Mechem on Agency, Sec. 763 (2nd Ed.).

In the light of these authorities, I find it necessary to, and I do find as a fact, that the President did not approve this specific project as required by the Lanham Act as amended.

(3) *Whether or not funds were allotted for substantial additions or improvement to the Belle Haven system as required by the Lanham Act, as amended.*

The evidence shows that funds were allotted for the acquisition and addition to the Belle Haven sewer system of the sewer lines from the subdivision of Fair Haven and from the Anti-Aircraft Battery at Mount Eagle. While these additions were more of a burden than an "improvement", they nevertheless were "additions", and it is also true that funds were allotted for the building of a large trunk sewer, to which the Belle Haven system was connected, and this constituted both an "addition" and an "improvement." I therefore find as a fact that funds were allotted for substantial additions and improvements to the Belle Haven sewer system as required by the Lanham Act, as amended.

(4) *Whether or not the Belle Haven Realty Corporation gave its consent to the acquisition by the plaintiff of the Belle Haven sewer system.*

The Corporation's answer, filed December 15, 1950, and signed by J. Randall Caton, who has since died, alleges that the Corporation only consented to the taking of the Belle Haven System and the acceptance of nominal damages on the condition that there be no maintenance, operation, construction, reconstruction, replacements, or assessment charges levied against the lot owners.

In its amended answer filed December 24, 1953, after Mr. Caton's death and after the Supreme Court's decision, the Corporation alleged that both its consent to the taking and its agreement to accept nominal damages were conditioned upon there being no maintenance, operation, construction, reconstruction, replacements or assessment charges against the Belle Haven lot owners.

However, the following letters seem to me to make the conclusion irresistible that the Corporation did consent,

and its consent was not conditioned upon the incorporation in the order of taking of a provision that the householders be exempted from either a service charge or an amortization charge. Letter from Paul Emmert, Special Assistant General Counsel, Federal Works Agency, to J. Randall Caton, dated July 13, 1942:

"I understand that you want a formal statement of the Government's intention respecting the acquisition of the Belle Haven Sewer System in Fairfax County, Virginia.

"This letter is to advise you that in accordance with the understanding which representatives of this Agency reached with you and Mr. Howell, this Agency intends to acquire by condemnation the entire Belle Haven Sewer Facility as well as a right of way to provide a sewer line for the Anti-Aircraft Battery. It is understood that the Land Company will claim only nominal damages. A stipulation to this effect will be filed in the proceeding and it will include such further agreements as may be arrived at between the Company and the Government hereafter."

Letter from Caton to Emmert, dated July 17, 1942:

"I thank you for your favor of July 13th, in which you advise that it is the understanding of the representatives of the Federal Works Agency that the Agency intends to acquire by condemnation the entire Belle Haven Sewer Facility as well as a right of way to provide a sewer line for the Anti-Aircraft Battery, and that it is understood that the Corporation will claim only nominal damages. It is agreeable that a stipulation to this effect will be filed in the proceedings when initiated and included in such further agreements as may be arrived at between the Company and the Government hereafter."

Letter from Caton to A. Carter Whitehead, Special Assistant to the United States Attorney, dated May 14, 1948:

> "Our Corporation had a meeting yesterday, and we feel that the pending proceedings incorporate the previous agreements that had been entered into between attorneys for the Government and our Corporation.
>
> "As you know, we have never taken the position that the taking of the entire sewer facilities in Belle Haven should include also perpetual maintenance to the present and future residents of Belle Haven.
>
> "We are delighted that the Government has determined to take all of the sewer facilities, with the understanding that these facilities and future sewer facilities in our development and in New Alexandria as to the property owned by us would have available the trunk line sewer without service or tapping fees or costs."

There is no question about the fact that, throughout these negotiations, J. Randall Caton, Jr. acted as attorney and agent for Belle Haven Realty Corporation and that everything he did was fully authorized. I have no doubt that he was thoroughly of the opinion that it was to the advantage of both the Corporation and the householders to have the Government condemn the entire sewer system and lease or sell it to Fairfax County. In his letter to Mr. Daniel L. Boland, Federal Works Agency, of November 12, 1947, he said in part:

> "I trust the Department will determine to condemn the entire Belle Haven System so that it then can be leased or sold in its entirety to Fairfax County, where the County will, of course, have the right to impose such service costs as are necessary.
>
> "I do not believe the property owners of Belle Haven could recover more than nominal damages, if any, for the simple reason that nothing will be taken from them, but that they will be benefitted for a Gov-

ernment Authority being responsible for the maintenance of the entire system."

I cannot escape the conclusion from the evidence before me, principally correspondence, that the Corporation, through Mr. Caton, consented to the taking and agreed to accept nominal damages. He certainly recognized that the householders (he being one of them) would be liable for a service charge. When a service charge was made by the County, it obviously was in a sum sufficient to cover operating and maintenance charges of the Belle Haven System, and also a sum for amortization of the entire system, including the trunk line, which the County had bought from the Government. I believe that Mr. Caton was surprised and disappointed that a sum intended for amortization was included in the service charge. This clearly appears from the answer which he filed for the Corporation on December 15, 1950. However, I cannot find anything in the correspondence to show that he had previously demanded, or that any Government agent had agreed, that there would be no such charge. I am quite sure that Mr. Caton *thought* that the Corporation had an agreement with the Government that the taking of the system for a nominal consideration was conditioned on no charge being imposed on the lot owners for amortization of the trunk line. Quite possible, if Mr. Caton were alive to testify, he might convince the Court that there actually was such an agreement. However, on the evidence which is in the record, I must and do find as a fact that Belle Haven Realty Corporation gave its consent to the acquisition by the Government of the Belle Haven sewer system for a nominal consideration, which consent was not qualified by any consideration which has not been performed.

Conclusions of Law

Since on issue No. 2, I have found as a fact that the President did not approve this specific project, as required by the Lanham Act, as amended, it follows that the con-

demnation sought herein is not authorized by the Lanham Act, which is the authority relied upon by the Government for this taking. I therefore conclude that the condemnation sought by petitioner herein is without authority of law. An order will be entered setting aside the orders vesting title in petitioner, and dismissing this action.

(S.) A. W. BARKSDALE,
United States District Judge Designate.

A True Copy, Teste:
WALKLEY E. JOHNSON, *Clerk.*
By (S.) FRANCES E. MUMFORD, *Deputy Clerk.*

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